IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Steve Weinberg, Plaintiff, vs. National Football League Players Association, Richard Berthelsen, Gene Upshaw, Tom DePaso, Trace Armstrong, Roger Kaplan, John Collins, Keith Washington, Tony Agnone, Howard Shatsky, and Mark Levin, Defendants.	§ § § § § § § § § § § §	Civil Action No. 3-06-CV-2332-B **ECF**

NFLPA DEFENDANTS' MOTION AND BRIEF IN SUPPORT OF THEIR MOTION TO COMPEL ARBITRATION AND TO DISMISS THE PETITION

Pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq., Defendants National Football League Players Association ("NFLPA"), Richard Berthelsen, Gene Upshaw, Tom DePaso, Trace Armstrong, Mark Levin, John Collins, and Keith Washington (collectively the "NFLPA Defendants") submit this Motion and Brief in Support of Their Motion to Compel Arbitration and to Dismiss the Petition. Alternatively the NFLPA Defendants move to compel arbitration against certain NFLPA Defendants and to stay these proceedings as to the other defendants. The NFLPA Defendants further move to dismiss Plaintiff Steve Weinberg's ("Weinberg") causes of action for fraud and conspiracy to commit fraud for the independent reason that such claims violate Federal Rule of Civil Procedure 9(b). See Fed. R. Civ. P. 9(b).

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I. PRELIMINARY STATEMENT

Defendant NFLPA is a union certified by the National Labor Relations Board and, in accordance with federal labor law, serves as the exclusive bargaining agent of professional football players of the National Football League ("NFL"). Defendants Berthelsen, Upshaw, DePaso, and Levin are NFLPA employees (General Counsel, Executive Director, Staff Counsel, and Director of Salary Cap & Agent Administration, respectively); Defendant Armstrong is the former President of the NFLPA, a former NFL player, and a former union member; Defendant Washington is a former NFL player and a former union member; and Defendant Collins has served as outside counsel for the NFLPA and represented several NFLPA union members in certain legal proceedings related to this dispute.

Weinberg is a former NFLPA "Contract Advisor" – an agent certified by the NFLPA to represent NFL players in individual salary negotiations with NFL clubs. The crux of Weinberg's Petition is that a so-called "evil cabal" – consisting of the NFLPA Defendants, two NFLPA Contract Advisors (defendants Shatsky and Agnone), and a renowned labor arbitrator (defendant Kaplan) – conspired to revoke Weinberg's certification as an NFLPA Contract Advisor.[1] (See Petition, Introduction.) According to the Petition, the alleged conspiracy to decertify Weinberg violated various Texas laws. (See id. ¶ 93.) Weinberg's claims are not only frivolous, but must be dismissed because they are subject to mandatory arbitration.

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[1] For purposes of this motion, the NFLPA Defendants do not admit any of the factual allegations in the Complaint and expressly reserve the right to contest those allegations at an appropriate time.

Pursuant to federal law, the NFLPA serves as the exclusive collective bargaining agent of all NFL players. It is well-settled that, to the extent that the NFLPA elects to delegate a portion of such exclusive bargaining powers to certain Contract Advisors (such as Weinberg), the NFLPA has the sole discretion to determine the conditions of such delegation. One such condition is that all Contract Advisors must agree – as Weinberg did – to be bound by the NFLPA Regulations Governing Contract Advisors (the "NFLPA Agent Regulations").

The NFLPA Agent Regulations provide that "any and all" disputes relating to a Contract Advisor's activities must be submitted to binding arbitration. (See Appendix in Support of NFLPA Defendants' Motion and Brief in Support of Their Motion to Compel Arbitration and to Dismiss the Petition ("App.") at 5-6; 24 (NFLPA Agent Regulations, § 5(A)).) Weinberg is also bound by a second contract with the NFLPA, the "Weinberg-NFLPA Contract" (see p. 6, infra), in which he agreed that "if subsequent to obtaining certification it is revoked or suspended pursuant to the Regulations, the exclusive method for challenging any such action is through the arbitration procedures set forth in the Regulations." (See App. at 5.) The arbitration clauses in these two binding agreements could not be clearer, or broader. Under well established principles of federal law, Weinberg must arbitrate – not litigate – all of the claims he has asserted in this case.

Nor can Weinberg credibly dispute that arbitration is the proper forum since he has already submitted his claims to binding arbitration in the past. When Weinberg was first disciplined over three years ago, he submitted his grievance over the discipline to an arbitrator, in accordance with the NFLPA arbitration agreements. (See

App. at 30-54; (In re Steven Weinberg (Sept. 5, 2003).) In that arbitration, it was held that Weinberg "clearly" violated the NFLPA Agent Regulations by engaging in a variety of misconduct, including, among other things, violating the Texas Business and Commerce Code by fraudulently transferring assets to offshore accounts and devising a sham corporation in order to avoid a lawful judgment. (Id. at 046, 048, and 050.) Weinberg never challenged this binding arbitral decision, and, more to the point, his commencement of arbitration in accordance with his arbitration agreements with the NFLPA was an acknowledgement that these agreements are valid and enforceable. In fact, when the NFLPA's Disciplinary Committee proposed to discipline Weinberg a second time, for additional violations of the Agent Regulations, Weinberg again submitted his challenge to this discipline to binding arbitration. (See Petition ¶¶ 74-75.)

Weinberg's Petition is nothing more than an attempt to re-litigate these claims which have either already been arbitrated or, to the extent they have not been arbitrated, are subject to arbitration now. As explained below, the arbitration agreements *sub judice* require that Weinberg arbitrate his claims not only against the NFLPA, but against the NFLPA's employees, members and agents (i.e., all of the NFLPA Defendants).[2] Further, because Weinberg has alleged a conspiracy with the non-NFLPA Defendants, Weinberg's claims against them are also subject to binding arbitration. Consequently, all of Weinberg's claims are arbitrable, and the Petition should be dismissed in its entirety with prejudice.[3]

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[2] As set forth below, Weinberg also entered into a separate binding arbitration agreement with NFLPA Defendant Washington.

[3] In the event that the Court were to order arbitration in favor of only some of the NFLPA Defendants, judicial efficiency would require that the claims against the remaining defendants be stayed pending the outcome of that arbitration. See Point III, infra.

Finally, Weinberg's claims for fraud and conspiracy to commit fraud fail to satisfy Federal Rule 9(b)'s heightened pleading standards. Accordingly, all of these claims should be dismissed for this additional reason as well.

II. BACKGROUND

A. The NFLPA And Its Agent Regulations

Pursuant to section 9(a) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 159(a), the NFLPA is the exclusive bargaining representative of all NFL players. As a result, the NFLPA has sole discretion in determining whether to delegate its bargaining authority, under what conditions, and to whom. See White v. Nat'l Football League, 92 F. Supp. 2d 918, 924 (D. Minn. 2000) ("player agents are permitted to negotiate player contracts in the NFL only because the NFLPA has designated a portion of its exclusive representational authority to them."); Collins v. Nat'l Basketball Players Ass'n, 850 F. Supp. 1468, 1475 (D. Colo. 1991), aff'd 976 F.2d 740 (10th Cir. 1992) ("A union may delegate some of its exclusive representational authority on terms that serve union purposes, as the NBPA has done here. The decision whether, to what extent and to whom to delegate that authority lies solely with the union.").

The NFLPA Agent Regulations that govern Weinberg's activities as a Contract Advisor were promulgated pursuant to the union's authority under federal labor law and have been repeatedly upheld by the federal courts.[4] Weinberg's state law claims are thus subject to the agreed upon arbitration processes set forth in the NFLPA Agent Regulations, pursuant to both the NLRA and the FAA.[5] (See Point I, infra.)

B. The Three Arbitration Agreements

There are three separate, though related, arbitration agreements that apply to this case. First, all prospective Contract Advisors (including Weinberg), execute an "Application For Certification As An NFLPA Contract Advisor" (the "Application" or "Weinberg-NFLPA Contract"). The Application expressly states that if certification is granted by the NFLPA, "this Application and the certification, if one is issued to me, along with the [NFLPA Agent Regulations] shall constitute a contract between the NFLPA and myself." (See App. at 6.) Weinberg's Application for certification as an NFLPA Contract Advisor was granted, (see Petition ¶ 17), and thus both his Application (i.e., the Weinberg-NFLPA Contract) and the NFLPA Agent Regulations became binding contracts between the NFLPA and Weinberg. The Weinberg-NFLPA Contract states, in relevant part, as follows:

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[4] (See e.g., App. at 55-57 (Poston v. Nat'l Football League Players Ass'n, 06 Civ. 2249 (BSJ) (S.D.N.Y. May 1, 2006) (denying Contract Advisor's motion to enjoin NFLPA arbitral proceedings pursuant to the same arbitration clauses at issue here) (Slip. Op.)); App. at 98-103 (In re David Dunn, CV 05-1000, *4-5 (C.D. Cal. March 1, 2006) (Slip Op.) ("[A]s long as [Dunn] retained the status of an NFLPA certified agent, he was bound to the standards expressed in the NFLPA Agent Regulations, including the disciplinary procedures."); App. at 58-63 (Poston v. Nat'l Football League Players Ass'n, No. 02 CV 871, 2002 WL 31190142 (E.D. Va. Aug. 26, 2002) (denying Contract Advisor's motion to vacate NFLPA arbitral decision against him on the purported ground that the arbitration procedures set forth in the NFLPA Agent Regulations was biased)); see also Black v. Nat'l Football League Players Ass'n, 87 F. Supp. 2d 1 (D.D.C. 2000) (rejecting Contract Advisor's challenge to the fairness of the NFLPA's arbitral disciplinary proceedings).

[5] Weinberg's state law claims are also preempted by Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, and Section 9(a) of the NLRA, 29 U.S.C. § 159(a). (See Def.'s Not. of Removal (Dec. 18, 2006).)

> In submitting this Application, I agree to comply with and be bound by [the NFLPA Agent Regulations].
>
> I agree that if I am denied certification or if subsequent to obtaining certification it is revoked or suspended pursuant to the Regulations, the exclusive method for challenging any such action is through the arbitration procedure set forth in the Regulations.

(App. at 5 (emphasis added).)

Second, the NFLPA Agent Regulations, which are explicitly incorporated into the Weinberg-NFLPA Contract, contain a similarly broad arbitration clause: "This arbitration procedure shall be the exclusive method for resolving any and all disputes that may arise from … (4) Any other activities of a Contract Advisor within the scope of these Regulations." (App. at 24 (emphasis added).)

Third, Contract Advisors such as Weinberg must execute a Standard Representation Agreement ("SRA") with each of their NFL player clients. Defendant Keith Washington is a former NFL player and a former client of Weinberg's. (See Petition ¶ 67.) Weinberg and Washington executed a SRA (the "Weinberg-Washington Contract") that contains a clause requiring arbitration, in accordance with the NFLPA Regulations, of any dispute between them: "Any and all disputes between [Washington] and [Weinberg] involving the meaning, interpretation, application, or enforcement of this Agreement or the obligations of the parties under this Agreement shall be resolved exclusively through the arbitration procedures set forth in Section 5 of the NFLPA Regulations Governing Contract Advisors." (App. at 64 (emphasis added).)

C. The Weinberg-Silber Dispute

In 1998, Weinberg formed a joint venture with another Contract Advisor, Howard Silber. (See Petition ¶ 19.) The venture ended quickly and badly, and a sevenyear legal battle ensued. (See id. ¶ 20.) Weinberg and Silber eventually submitted their dispute to binding arbitration, and the arbitrator they selected ruled against Weinberg. (See id. ¶¶ 21-24.) Upon Silber's motion, this Court confirmed the arbitration award in favor of Silber. (Id. ¶ 26 ("the United States District Court for the Northern District of Texas issued an order confirming the arbitration award").)

Weinberg sought to overturn this Court's order confirming the arbitration award by appealing to the Fifth Circuit. The Fifth Circuit, however, "easily dispense[d]" with Weinberg's appeal, confirming the arbitration award and upholding this Court's prior decision. Weinberg v. Silber, 57 Fed. Appx. 211, at *2 (5th Cir. 2003). In doing so, the Fifth Circuit held that Weinberg's myriad attacks on the so-called "botched" arbitration award, (Petition ¶ 21), were "specious," "meritless," "border[line] frivolous," and "feckless." Weinberg, 57 Fed. Appx. 244, at *2-4. Notwithstanding the Fifth Circuit's vehement rejection of Weinberg's "specious" attacks on the Weinberg-Silber arbitration award, Weinberg has reasserted those very same "feckless" claims in this Court through his Petition. Compare Weinberg, 57 Fed. Appx. 211, at *2-4 with Petition ¶¶ 19-26.

D. Weinberg's Eighteen-Month Suspension

While Weinberg's "feckless" appeal of the Weinberg-Silber arbitration award was pending before the Fifth Circuit, Silber sought to collect on his judgment. (See Petition ¶ 27.) But Weinberg, in blatant defiance of this Court's order confirming the arbitration award, refused to honor the judgment. As found by the arbitrator under the NFLPA Agent Regulations, Weinberg transferred assets to offshore accounts and created a sham corporation to avoid paying Silber. (See App. at 50.) Silber thereafter filed proceedings to garnish commissions payable to Weinberg from Weinberg's NFL player clients. (Id.) Thus, the direct result of Weinberg's refusal to honor a judgment entered by this Court was to subject his NFL player clients to garnishment proceedings in the midst of an NFL season.

The NFLPA Disciplinary Committee, which is made up of current and former NFL players, held a conference call – in which Weinberg participated – to review Weinberg's conduct. (See Petition ¶¶ 43, 51, 52.) After the call, the Disciplinary Committee proposed that Weinberg be decertified with an opportunity to reapply for certification after three years.[6] (See id.) The Disciplinary Committee also determined that there were "extraordinary circumstances" warranting immediate imposition of the proposed discipline. (See id.) Weinberg appealed both the proposed discipline and the decision to impose it immediately, thus submitting the dispute to binding arbitration under the NFLPA Agent Regulations. Because the proposed discipline went into effect immediately, Weinberg was entitled to, and received, an expedited arbitration.

Just eleven days after the Disciplinary Committee's action, an arbitration was held regarding the immediacy of Weinberg's suspension. (See App. at 67-88 (In re NFLPA Steven Weinberg (Feb. 26, 2003) ("Order Denying Weinberg's Mot. for Stay").) In that expedited hearing, Weinberg made many of the same baseless arguments that he avers in the Petition.[7] For example, in the Petition, Weinberg claims that the specific NFLPA Agent Regulation on which his immediate decertification was based "was specifically written in an attempt to justify the procedural process (or lack of due process) surrounding [Weinberg's] immediate revocation." (Petition ¶ 63.) Weinberg, however, arbitrated the same exact claim over three and a half years ago. At that time, the arbitrator rejected Weinberg's claim (which was as frivolous then as it is now), finding that the regulation permitting "immediate" decertification had been passed three years prior (in 2000), and that the regulation had been distributed to all Contract Advisors and was binding. (See App. at 83-84.)

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[6] Under the NFLPA Agent Regulations, the NFLPA Disciplinary Committee (now known as "CARD") can recommend discipline, which, if challenged by the Contract Advisor, is then submitted to arbitration. CARD may immediately impose discipline under "extraordinary circumstances," in which case the Contract Advisor is entitled to an expedited arbitration. (See App. at 26-29.)

[7] Rather than expedite an arbitration about the merits of the proposed discipline, Weinberg chose to expedite only the procedural issue of the propriety of the immediate imposition of the proposed discipline.

Weinberg's allegations in the Petition about the purportedly excessive length of the discipline were also previously arbitrated in 2003, in a binding, two-day arbitration in which Weinberg had the opportunity to present evidence, argument, and examine and cross-examine witnesses. (See App. at 31.) In a lengthy and well-reasoned opinion, the arbitrator describes in detail the evidentiary bases for his conclusion that Weinberg's conduct violated the NFLPA Agent Regulations by: (1) creating a "conflict of interest" with the effective representation of his NFL player clients; (2) violating the Texas Business and Commerce Code in trying to avoid the lawful Weinberg-Silber judgment; (3) engaging in conduct which "reflect[ed] poorly on his fitness as a Contract Advisor"; and (4) prematurely collecting fees from a client. (Id. at 046, 048, and 050.) Those determinations are binding under principles of claim and issue preclusion.[8]

Despite these findings, the arbitrator reduced Weinberg's proposed three year decertification to eighteen months, i.e., by half. (Id. at 051-053.) Just as significantly, the arbitrator changed the penalty from a three year *decertification*, to an eighteen month *suspension*, meaning that Weinberg would not have to reapply for certification after the eighteen month suspension had run. The Petition, however, simply ignores these facts. Compare id. with Petition ¶ 77 ("the exact same charge that the conspirators brought against Weinberg when they revoked his license for three (3) years") (emphasis added).

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[8] (See, e.g., App. at 89-94 (Consorcio Rive, S.A. v. Briggs of Cancun, Inc., No. Civ. A. 99-2204, 2000 WL 1023420, at *4 (E.D. La. July 27, 2000) ("[R]*es judicata* and collateral estoppel apply to arbitration awards.")); Miliken v. Grigson, 986 F. Supp. 426, 431-33 (S.D. Tex. 1997) (same).

E. Weinberg's Second Disciplinary Proceeding

In January of 2004, Defendant Washington, one of Weinberg's former NFL player clients, submitted a letter to the NFLPA in which he expressed his frustration at being dragged into the Weinberg-Silber feud. Washington's letter described yet additional misconduct by Weinberg in violation of the NFLPA Agent Regulations. (See Petition ¶ 66; App. at 95-97 ("If either Weinberg or Silber is ever allowed to represent anyone in our league again, it will be a great injustice to all players.").) After investigating the charges, the NFLPA Disciplinary Committee proposed that Weinberg be decertified for five years, with an opportunity to reapply for certification. (See Petition ¶ 66.) Weinberg appealed the discipline, thus submitting the dispute to binding arbitration pursuant to the Weinberg-NFLPA Contract, the NFLPA Agent Regulations, and the Weinberg-Washington Contract. (Id. ¶ 75.) That arbitration is still pending because Weinberg unilaterally stopped pursuing his appeal.[9] (Id.)

F. The Petition

Weinberg's Petition is an attempt to re-litigate the claims described above, which have already been submitted to arbitration. The state law claims asserted in the

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[9] On August 4, 2004, Weinberg's counsel wrote to the arbitrator that "we are interested to receive first the responses to our discovery requests and will ask that you schedule a hearing on this matter once we have reviewed them." (App. at 110.) This was Weinberg's last communication in that case.

Petition are nothing more than another attack upon the immediacy and severity of Weinberg's discipline, (see Petition ¶¶ 52-65), but these issues have already been submitted to arbitration pursuant to the Weinberg-NFLPA Contract, the NFLPA Agent Regulations, and the Weinberg-Washington Contract. (See pp. 7-10, supra.) Indeed, according to the Petition, "the purpose and goal of [the alleged] conspiracy" was "to revoke Weinberg's certification as an NFLPA Contract Advisor." (See Petition ¶ 38.) Yet, Weinberg has expressly agreed that "if subsequent to obtaining certification it is revoked or suspended pursuant to the Regulations, the exclusive method for challenging any such action is through the arbitration procedure set forth in the Regulations." (App. at 5 (emphasis added).) This is a classic "broad" arbitration clause that unequivocally covers this dispute, and hence, under the FAA, arbitration is mandatory.

III. ARGUMENT

The FAA strongly favors arbitration. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983). Accordingly, a federal court must order arbitration if it is satisfied that the claim at issue is within the scope of a valid, enforceable agreement to arbitrate. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985). On a motion to compel arbitration, courts should resolve any doubts in favor of arbitration. Moses H. Cone Mem'l Hosp., 460 U.S. at 24-25; Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625-26 (1985). In fact, a court should grant a party's arbitration demand absent "positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960). These strong policies in favor of arbitration are especially applicable in the context of federal labor law. United Steelworkers of Am., 363 U.S. at 584-85 ("[T]he court should view with suspicion an attempt to persuade it to become entangled in the construction of the substantive provisions of a labor agreement, even through the back door of interpreting the arbitration clause, when the alternative is to utilize the services of an arbitrator.").

Here, Weinberg is asking the Court to immerse itself in one of the most important and fundamental labor law functions of the NFLPA: the delegation of a limited portion of its bargaining authority to Contract Advisors. Those determinations, however, belong solely to the union under established principles of federal labor law:

> As the exclusive representative for all of the NBA players, the NBPA is legally entitled to forbid *any* other person or organization from negotiating for its members.... A union may delegate some of its exclusive representational authority on terms that serve union purposes, as the NBPA has done here. The decision whether, to what extent and to whom to delegate that authority lies solely with the union.

Collins, 850 F. Supp. at 1475. It was in accordance with this exclusive authority to determine "whether, to what extent and to whom to delegate" its exclusive bargaining authority that the NFLPA established the NFLPA Agents Regulations. (See App. 24-29.)[10]

The NFLPA Agent Regulations provide for a comprehensive and fair arbitration system in which Contract Advisors agree to arbitrate any dispute with the NFLPA under the American Arbitration Association labor arbitration rules, with the right to, among other things, submit briefs, present evidence, and examine (and cross examine) witnesses. Moreover, it is the NFLPA Disciplinary Committee – not the Contract Advisor – which bears the burden of proof at such arbitrations. (See App. at 25, NFLPA Agent Regulations, § 5(E).) Weinberg has not only invoked these arbitration procedures in the past, but he benefited from them when the arbitrator reduced his original proposed three year decertification to an eighteen month suspension. (See p. 10, supra.)

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[10] The NFLPA's exclusive bargaining power under federal labor law means that Contract Advisors "are permitted to negotiate player contracts in the NFL only because the NFLPA has designated a portion of its exclusive representational authority to them." White, 92 F. Supp. 2d at 924; (see also App. at 98-103 (Dunn, CV 05-1000, *4-5 (holding that the NFLPA has "sole discretion in choosing its agents" under the NLRA).)

Now, however, Weinberg – in complete disregard of his agreements to arbitrate and the union's sole discretion to determine "whether, to what extent and to whom to delegate" its bargaining authority – seeks to have this Court inject itself into the internal union affairs of the NFLPA. This, the Court may not do. Such intervention would violate both the FAA and the federal policy against judicial interference into the internal workings of a union. See, e.g., Int'l Bd. of Teamsters v. Local Union No. 810, 19 F.3d 786, 788 (2d Cir. 1994) ("federal courts should be slow to rush into what is essentially a matter of internal union governance"); Motion Picture & Videotape Editors Guild, Local 776 v. Int'l Sound Technicians, Local 695, 800 F.2d 973, 975 (9th Cir. 1986) ("There is a well-established federal policy of avoiding unnecessary interference in the internal affairs of unions ...."). It is for precisely these reasons that federal courts decline to become involved in internal union affairs, especially in the face of broad arbitration clauses, such as those that encompass all of Weinberg's claims here.[11]

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[11] It is thus not surprising that all prior judicial challenges to the NFLPA's agent arbitration procedures have failed. (See App. at 55-57 (Poston, 06 Civ. 2249 at *1-2 (denying Contract Advisor Poston's motion to enjoin NFLPA arbitral disciplinary proceedings against him)); App. at 98-103 (Dunn, CV 05-1000, *4-5 ("Defendant Dunn must comply with his contract obligations and submit to the NFLPA's disciplinary proceedings."); App. at 58-63 (Poston, 2002 WL 31190142 (denying Contract Advisor Poston's motion to vacate a disciplinary award on the purported ground that the NFLPA arbitration procedures were biased)); Black, 87 F. Supp. 2d at 5 (rejecting Contract Advisor Black's challenge to the fairness of the NFLPA's arbitral proceedings).

A. All of the Claims Set Forth in the Petition Are Subject to Binding Arbitration.

1. Weinberg Entered Into Broad Arbitration Agreements That Encompass All Of His Claims Against The NFLPA Defendants.

Fifth Circuit courts analyze two issues in determining whether a party must submit to arbitration: (1) whether there is a valid agreement to arbitrate between the parties; and (2) whether the dispute in question falls within the scope of the arbitration agreement. See OPE Int'l, LP v. Chet Morrison Contractors, Inc., 258 F.3d 443, 445-46 (5th Cir. 2001); Webb v. Investacorp, Inc., 89 F.3d 252, 257-58 (5th Cir. 1996).[12] Here, there are three binding arbitration provisions which apply to this case.

First, there is the arbitration clause contained in the Weinberg-NFLPA Contract: "I agree that if I am denied certification or if subsequent to obtaining certification it is revoked or suspended pursuant to the Regulations, the exclusive method for challenging any such action is through the arbitration procedures set forth in the Regulations." (See App. at 5). Second, there is Section 5(A) of the NFLPA Agent Regulations, which Weinberg has agreed to abide by: "arbitration procedure shall be the exclusive method for resolving any and all disputes that may arise from ... any other activities of a Contract Advisor within the scope of these Regulations."[13] (App. at 24.) And, third, there is the arbitration clause in the Weinberg-Washington Contract: "Any and all disputes between [Washington] and [Weinberg] involving the meaning,

[12] "Under § 4 of the FAA, the federal district court ascertains only whether the arbitration clause covers the allegations at issue. If the dispute is within the scope of the arbitration clause, the court may not delve further into the merits of the dispute." Primerica Life Ins. Co. v. Brown, 304 F.3d 469, 471 (5th Cir. 2002) (quotations omitted).

[13] The NFLPA Agent Regulations also require Weinberg to arbitrate his claims against defendants Shatsky and Agnone, who are NFLPA Contract Advisors. (See App. at 24, NFLPA Agent Regulations, § 5(A)(5).)

interpretation, application, or enforcement of this Agreement or the obligations of the parties under this Agreement shall be resolved exclusively through the arbitration procedures set forth in Section 5 of the NFLPA Regulations Governing Contract Advisors." (App. at 64.) These three arbitration clauses could not be broader or clearer in their application to this dispute. All of Weinberg's claims in the Petition are therefore subject to mandatory arbitration under Section 3 of the FAA.[14]

2. Each Of The NFLPA Defendants May Invoke The Arbitration Agreements.

As signatories to one or more of the arbitration agreements, both the NFLPA and Washington are unquestionably entitled to invoke those agreements to compel arbitration by Weinberg under Section 3 of the FAA. In addition, all of the other NFLPA Defendants – who are employees, officers, or agents of the NFLPA – are similarly covered by Weinberg's arbitration agreements with the NFLPA because, under ordinary contract and agency principles, non-signatory employees and agents may invoke arbitration agreements entered into by their principals. (See, e.g., App. at 162 (N. River Ins. Co. v. Transamerica Occidental Life Ins. Co., No. 399-CV-0682-L, 2002 WL 1315786, at *5 (N.D. Tex. June 12, 2002) ("Using tradition[al] principles of agency law, if a principal is bound under the terms of a valid arbitration clause, its agents, employees, and representatives are also covered by that agreement.").)[15]

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[14] Clauses which contain "any dispute" language are considered the broadest type of arbitration clause. See, e.g., Rojas v. TK Commc'ns, Inc., 87 F.3d 745 (5th Cir. 1996); In re Complaint of Hornbeck Offshore Corp., 981 F.2d 752 (5th Cir. 1993).

[15] (See also App. at 109 (Rushe v. NMTC, Inc., No. 01-3440, 2002 U.S. Dist. LEXIS 7420, at *21-22 (E.D. La. Apr. 17, 2002) ("[A] review of the relevant jurisprudence shows that claims by or against agents, employees, financing entities, guarantors, and closely related companies be arbitrated pursuant to related arbitration agreements entered by the signatory affiliates.")); App. at 171-72 (Baum v. Avado Brands, Inc., No. 3:99-

This fundamental principle applies to NFLPA Defendants Berthelsen (NFLPA General Counsel), Upshaw (NFLPA Executive Director), DePaso (NFLPA Staff Counsel), Armstrong (former NFLPA President) and Levin (NFLPA Director of Salary Cap and Agent Administration). Collins, the remaining NFLPA Defendant and an outside counsel for the NFLPA and its union members, may also invoke the NFLPA's arbitration agreements because he served as an agent for the NFLPA and has been named as a Defendant solely by virtue of his acting in that capacity. (See Petition ¶¶ 71, 82;[16] App. at 109 (Rushe, 2002 U.S. Dist. LEXIS 7420, at *21-22).)

3. All Defendants Are Entitled To Compel Arbitration Against Weinberg Under Principles Of Equitable Estoppel.

It is settled law in this Circuit that a signatory to an arbitration agreement (such as Weinberg) will be equitably estopped from denying arbitration of claims against a nonsignatory (such as Berthelsen, Upshaw, DePaso, Armstrong, Levin, Collins or the non-NFLPA Defendants), where the claims against the nonsignatory bear a close relationship to the rights and obligations contained in the signatory's arbitration agreement. See Grigson v. Creative Artists Agency, L.L.C., 210 F.3d 524, 527 (5th Cir. 2000); Brown v. Pac. Life Ins. Co., 462 F.3d 384, 398-99 (5th Cir. 2006).[17] The seminal

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CV-0700G, 1999 WL 1034757, at *7 (N.D. Tex. Nov. 12, 1999) (same))); see also In re Vesta Ins. Group, Inc., 192 S.W.3d 759, 763 (Tex. 2006) ("[M]any [federal courts and] Texas courts of appeals have held that a tortious interference claim against a signatory's employees or affiliates must be arbitrated, even though the latter are nonsignatories.").

[16] Weinberg claims that Collins gave false testimony on the NFLPA's behalf in the arbitration in which Weinberg's three year decertification was reduced and that Collins was retained by various NFLPA union members to defend them from the garnishment proceedings involving Weinberg and Silber. (Petition ¶¶ 71, 82.)

[17] See also CD Partners, LLC v. Grizzle, 424 F.3d 795, 798-99 (8th Cir. 2005); E.I. Dupont De Nemous & Co. v. Rhone Pouluc Fiber & Resin Intermediates, 269 F.3d 187, 199-201 (3d Cir. 2001); Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 418 (4th Cir. 2000); MS Dealer Serv. Corp. v. Franklin, 177 F.3d 942, 947

case in this Circuit is Grigson, in which the Fifth Circuit held that equitable estoppel should be applied in two alternative situations.

"First, equitable estoppel applies when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the nonsignatory." Id. (citing MS Dealer Serv. Corp., 177 F.3d at 947). This alternative prong of the test is satisfied here. Weinberg's claims against each of the NFLPA Defendants and non-NFLPA Defendants arise out of, and relate directly to, the NFLPA Agent Regulations and the Weinberg-NFLPA Contract, both of which contain broad arbitration agreements. Indeed, the Petition alleges that all Defendants conspired to decertify Weinberg in violation of the NFLPA Agent Regulations, which are expressly incorporated into Weinberg's Agent Contract. Weinberg repeatedly and explicitly relies on the NFLPA Agent Regulations in making these allegations. (See, e.g., Petition ¶¶ 48, 54, 68.)

"Second, application of equitable estoppel is warranted when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract." Id. For this second test to apply, the non-signatory defendant need only show that its alleged misconduct is "intertwined" with the signatory's alleged misconduct. Id. Accordingly, courts are "quick to find the second Grigson prong satisfied when a signatory makes claims against a signatory and a non-signatory collectively and/or alleges some type of joint conduct." (App. at 117 (Skyleasing, LLC v. Tejas Avco Inc., No. 14-05-00212-CV, 2006 WL 2290852, at *5

(11th Cir. 1999); In re Currency Conversion Fee Antitrust Litig., 361 F. Supp. 2d 237, 266 (S.D.N.Y. 2005); see generally 1 Domke on Com. Arb. § 13:8 (2006).

(Tex. App.—Houston [14th Dist.] Aug. 10, 2006, no pet.)); Jureczki v. Banc One Tex., 252 F. Supp. 2d 368, 375-78 (S.D. Tex.), aff'd, 75 Fed. Appx. 272 (5th Cir. 2003) (non-signatory defendants permitted to invoke arbitration agreement where plaintiff signatories made allegations against non-signatories and signatories collectively as "defendants," and allegation that all defendants acted in concert to defraud plaintiffs was at the heart of all claims).[18]

Here, the claims asserted by Weinberg are conspiracy claims, in which signatories to broad arbitration agreements with Weinberg (the NFLPA and Washington) are alleged to have conspired with non-signatories (the other Defendants). (See Petition ¶¶ 38, 67, 82, 90). Such conspiracy allegations clearly satisfy the second alternative prong of the Grigson test, thus permitting all of the defendants in this case to invoke the arbitration agreements at issue against Weinberg.

B. The Court Should Dismiss the Petition.

The FAA permits courts to dismiss proceedings in their entirety when all of the plaintiffs' claims are subject to arbitration. See 9 U.S.C. §§ 3-4; Alford v. Dean Witter Reynolds, Inc., 975 F.2d 1161, 1164 (5th Cir. 1992). Indeed, "if all of the issues in dispute are governed by the arbitration agreement, then it would generally be an inefficient use of the court's docket to enter a stay" and the proper remedy would be a dismissal. (See App. at 125 (Wilson v. Wells Fargo Fin. Acceptance, Inc., No. 3:02-0383, 2003 WL 1877336, at *3 (M.D. Tenn. Apr. 9, 2003)); App. at 127 (Copeland v. KB Home, No. 3:03-CV-227-L, 2004 WL 1778949, at *1 (N.D. Tex. Aug. 4, 2004) ("Dismissal is appropriate when all of the issues raised in the district court must be submitted to arbitration.")).)[19] Because all of the claims against all of the defendants are subject to binding arbitration, both an order to compel arbitration and dismissal is appropriate in this case.[20]

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[18] See also, Hill v. GE Power Sys., Inc., 282 F.3d 343, 347 (5th Cir. 2002) (non-signatory defendant alleged to have "worked in tandem" with signatory defendant was able to enforce arbitration agreement against plaintiff); Am. Reliable Ins. Co. v. Arrington, 269 F. Supp. 2d 758, 762 (S.D. Miss. 2003) (noting that the Fifth Circuit upholds the right of non-signatories to enforce arbitration agreements when a complaint alleges conspiracy or other concerted wrongdoing among the non-signatories and the signatory); In re EGL Eagle Logistics, 89 S.W.3d 761, 763-66 (Tex. App.—Houston [1st Dist.] 2002, orig. proceeding [mand. denied]); (App. at 102-23 (Vaughn v. Leeds, Morelli & Brown, P.C., No. 04 Civ. 8391 (DLC), 2005 WL 1949468 (S.D.N.Y. Aug. 12, 2005) (civil conspiracy allegations sufficient to trigger estoppel and compel arbitration).))

C. If Weinberg Is Compelled to Arbitrate Against Less Than All Defendants, the Court Should Issue A Stay With Respect to Any Nonarbitral Claims.

In the event the Court declines to compel arbitration against any of the defendants, the Court should stay these proceedings pending resolution of the arbitral claims. There are five reasons why courts routinely stay proceedings where there is a related arbitration between the plaintiff and a defendant that could render the litigation academic, or clarify or narrow the remaining issues.[21]

First, the Supreme Court has recognized a strong, federal policy in favor of arbitration. Staying a litigation between *A* and *B*, while *A* arbitrates with *C* a related dispute that can affect the *A/B* litigation, is consistent with this strong federal policy.[22] Second, staying a litigation pending the outcome of a potentially dispositive arbitration between the plaintiff and another party avoids "possible inconsistent results." See, e.g., Waste Mgmt., 372 F.3d at 345. Third, a stay in such circumstances serves to promote judicial economy. See, e.g., Morrison v. Amway Corp., 49 F. Supp. 2d 529, 532 (S.D. Tex. 1998). In addition to potentially disposing of the entire litigation outright on the basis of claim or issue preclusion, the arbitration decision may partially dispose of issues, and thus clarify and reduce the issues for the court. (See, e.g., App. at 138 (United States v. Clipper Shipping Co., No. 93-2798, 1995 WL 131077, at *3 (E.D. La. Mar. 23, 1995) (granting stay of litigation where arbitration "will resolve disputes" related to plaintiff's claims against non-signatory)).) Fourth, in addition to potentially disposing, whether partially or entirely, of issues in the litigation, the arbitration, even if not dispositive, can provide the court with insight into the issues of law and fact. See, e.g., Hikers Indus., Inc. v. William Stuart Indus. Ltd., 640 F. Supp. 175, 178 (S.D.N.Y. 1986). Fifth, courts are concerned that parties subject to arbitration agreements will file lawsuits to obtain discovery that may not be available in the arbitration. Id. Staying the litigation thus ensures that one party to the arbitration does not have an unfair advantage over the other.

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[19] (App. at 134 (Rubin v. Sona Int'l Corp., No. 05 Civ. 6305, 2006 WL 525658, at *5 (S.D.N.Y. Mar. 3, 2006))); Lewis Tree Serv., Inc. v. Lucent Techs., Inc., 239 F. Supp. 2d 332, 340 (S.D.N.Y. 2002).

[20] Alternatively, all claims subject to arbitration are subject to the mandatory stay set forth in Section 3 of the FAA. See 9 U.S.C. § 3.

[21] See, e.g., Harvey v. Joyce, 199 F.3d 790, 795-96 (5th Cir. 2000) (granting non-signatory a stay pending a related arbitration between plaintiff and a defendant); Waste Mgmt., Inc. v. Residuos Industriales Multiquim, 372 F.3d 339, 345 (5th Cir. 2004) (same); Subway Equip. Leasing Corp. v. Forte, 169 F.3d 324, 329 (5th Cir. 1999) (same).

In light of all of these compelling considerations, it is not surprising that the Fifth Circuit's standards for obtaining a stay pending the completion of a related arbitration are easily satisfied in this case. Indeed, to be entitled to a stay in these circumstances, all a defendant need show is that plaintiff's claims against it, on the one hand, and against the arbitration defendant, on the other hand, "involve the same set of operative facts," or that the litigation will "undermine the arbitration proceedings and thwart the federal policy in favor of arbitration." Hill, 282 F.3d at 347.[23]

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[22] See, e.g., Waste Mgmt., 372 F.3d at 345 (staying proceedings pending arbitration because "[g]iven the binding effect of a federal judgment…the…arbitrator would necessarily be strongly influenced to follow the court's determination."); Harvey, 199 F.3d at 795-96 ("[I]f [the non-signatory] were forced to try the case, the arbitration proceedings would be both redundant and meaningless.").

The substantial overlap between the facts and issues in the mandatory arbitrations between Weinberg and the NFLPA and Weinberg and Washington on the one hand, and the claims in the Petition against any of the other Defendants on the other hand, inexorably lead to the conclusion that a stay should issue if the Petition is not dismissed. All claims against all of the defendants revolve around the same alleged conspiracy, would require an examination of the same evidence and would address the same legal issues. Indeed, issue and claim preclusion may very well make such arbitrations dispositive of all of Weinberg's claims here. A stay is clearly warranted here. As recently explained by one court which issued a stay when faced with a similar situation:

> [B]ecause Plaintiffs allege concerted conduct and a joint conspiracy to defraud, it would be inefficient and risk inconsistent findings and rulings to permit this case to proceed against the non-arbitrable Defendants after compelling arbitration against [other defendants].

Amato v. KPMG LLP, 433 F. Supp. 2d 460, 491-92 (M.D. Pa. 2006), modified on other grounds, Amato v. KPMG LLP, No. 06 CIV 39, 2006 U.S. Dist. LEXIS 57091 (M.D. Pa. Aug. 14, 2006). Here, it is likely that the arbitration between Weinberg and the NFLPA

[23] See also Hill, 282 F.3d at 348 (explaining courts' preference for "the preservation of the arbitration rights of the signatory defendant over the speedy resolution of claims against nonsignatories."); In re Ghanem, 203 S.W.3d 896, 900 (Tex. App.—Beaumont 2006, no pet.) (staying proceedings where "[t]o permit [non-signatory] to carry on the litigation pursuant to claims identical to those involved in the arbitration process could seriously jeopardize [arbitrating defendants'] right to have those claims resolved by binding arbitration.").

will resolve Weinberg's claims against all defendants. Permitting litigation to go forward would thus likely waste judicial resources, and risk inconsistent results.[24]

D. Weinberg's Fraud and Conspiracy to Commit Fraud Claims Should be Dismissed Pursuant to Rule 9(b).

Weinberg has asserted claims for fraud and conspiracy to commit fraud against all of the defendants in this case. (See Petition ¶¶ 94-108.) Such fraud-based claims are subject to the heightened pleading requirements of Federal Rule 9(b). See Fed. R. Civ. P. 9(b). To satisfy the Fifth Circuit's "strict interpretation" of Rule 9(b), a complaint must specify "the statements contended to be fraudulent, identify the speaker, state when and where the statements were made, and explain why the statements were fraudulent." Nathenson v. Zonagen, 267 F.3d 400, 412 (5th Cir. 2001); Sealed Appellant I v. Sealed Appellee I, 156 Fed. Appx. 630, 633 (5th Cir. 2005) ("To satisfy Rule 9(b) the complaint must allege the 'who, what, when, where, and how of the alleged fraud.'").

Here, the general and conclusory allegations in the Petition fail to identify, fundamentally, "what" specific fraud each individual defendant is alleged to have committed. Indeed, although the Petition avers a variety of purportedly bad behavior on the part of the defendants, it is impossible to discern what specific conduct Weinberg is alleging to be fraudulent. For example, in Count One, "Fraud," Weinberg merely

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[24] Where, as here, an action should be stayed pending the outcome of an arbitration, it is axiomatic that discovery should also be stayed. (See, e.g., App. at 141 (Poly-America, Inc. v. Beech Street Corp., No. 3:01-CV-1073-H, 2001 WL 1326450, at *2 (N.D. Tex. Oct. 12, 2001)); App. at 145 (In re Ghanem, 203 S.W.3d at 900; App. at 145 (Downer v. Siegel, No. Civ. A. 02-1706, 2002 WL 31106920, at *4 (E.D. La. Sept. 19, 2002)).) Indeed, in the interest of judicial efficiency, discovery should be stayed upon the filing of this motion to compel arbitration. (See, e.g., App. at 148 (Ross v. Bank of Am., N.A. (USA), No. 05 Civ. 7116, 2006 U.S. Dist. LEXIS 208, at *1 (S.D.N.Y. Jan. 6, 2006)); App. at 153-54 (Intertec Contracting A/S Intertec (Gibraltara) Ltd. v. Turner Steiner Int'l, S.A., No. 98 Civ. 9116, 2001 U.S. Dist. LEXIS 9950, at *21 (S.D.N.Y. July 18, 2001)).)

"realleges all of the foregoing paragraphs," and generally claims that "defendants" made "certain" "material and false representations." (Petition ¶¶ 94-98.) Weinberg, however, fails to identify "what" specific representations were part of the alleged fraud, "who" made the representations, "when," the representations were made, etc.

Even a paragraph-by-paragraph review of the Petition does not shed any light on what specific fraud Weinberg is claiming. With respect to Levin, for example, Weinberg solely alleges that Levin "submit[ted] two (2) separate false and misleading affidavits in connection with two (2) separate legal proceedings that were pending in Dallas, Texas." (Id. ¶ 90.) These allegations do not identify in "what" proceedings Levin purportedly submitted affidavits, "when" the alleged affidavits were submitted, or what specific statements in those affidavits were supposedly fraudulent. To give another example, the sum total of Weinberg's allegations against Washington is that he submitted a letter to the NFLPA. (See Petition ¶ 67.) But the Petition does not allege that any of the statements in Washington's letter were false, much less identify what specific statements are "contended to be fraudulent."[25] Nathenson, 267 F.3d at 412. Similarly, Weinberg's lone fraud-based allegation against Armstrong is that he purportedly "read aloud from scripted answers prepared by Berthelsen" at the expedited arbitration. (Petition ¶ 65.) But again, Weinberg does not even allege that Armstrong's testimony was false. Such conclusory allegations of fraud do not satisfy Rule 9(b).

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[25] Such allegations not only fail to satisfy Rule 9(b), but the NFLPA Defendants believe that Weinberg averred them solely as a means to improperly join Washington in an attempt to defeat diversity jurisdiction. (See Defendants' Notice of Removal, ¶ 31 (Dec. 18, 2006).) The NFLPA Defendants believe that Weinberg's baseless allegations against Collins were also made for the sole purpose of improperly seeks to defeat diversity.

Weinberg's conspiracy to commit fraud claims should be dismissed for these same reasons. Count Two of the Petition, "Conspiracy to Commit Fraud," merely "repeats and realleges all of the foregoing paragraphs," without alleging what specific conduct constituted the fraud which supposedly was the subject of the claimed conspiracy. For example, Weinberg generally alleges that "[o]ne or more members of the group committed an unlawful, overt act to further the object or course of action," but he does not identify "what" specific fraudulent act he is alleging was part of the conspiracy, "who" purportedly committed it, etc. Nor does Weinberg allege "when," "where," or "how" the alleged conspiracy to commit fraud was formed, or "who" it purportedly includes. And while Weinberg alleges that the "objective of the group" included "committing fraud against Plaintiff," he, once again, fails to specify "what" fraud was allegedly the group's objective. For these reasons, Weinberg's conspiracy to commit fraud claims must also be dismissed pursuant to Federal Rule 9(b).

IV. CONCLUSION

For all of the foregoing reasons, the NFLPA Defendants respectfully request that this Court issue an order to compel arbitration and dismiss the action, or in the alternative, to compel arbitration and stay any remaining claims in this action pending the outcome of the arbitration. The fraud and conspiracy to commit fraud claims in the Petition should also be dismissed for the additional reason that they violate Rule 9(b).

Dated: January 9, 2006

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

This is to certify that on the 8th of January, 2007, counsel for the NFLPA Defendants conferenced with Bart F. Higgins, counsel for Plaintiff regarding the NFLPA Defendants' Motion and Brief in Support of Their Motion to Compel Arbitration and to Dismiss the Petition ("Motion"). Counsel for Plaintiff indicated that he opposed said Motion.

s/ Ralph I Miller
Ralph I Miller

CERTIFICATE OF SERVICE

On January 9, 2007, I electronically transmitted the foregoing document using the ECF system for filing and transmittal of a Notice of Electronic Filing to those parties registered for ECF in this case. I further certify that the foregoing document was served on all counsel of record by ECF.

s/ Aaron D. Ford
Aaron D. Ford